

MESA OPERATING LIMITED PARTNERSHIP (ON RECONSIDERATION)

IBLA 91-55

125 IBLA 28, 99 I.D. 274 (1992)

Decided February 3, 1994

Petition for reconsideration of a Board decision reversing a decision by the Deputy to the Assistant Secretary--Indian Affairs (Operations) denying an appeal requiring payment of underpaid royalties and recalculation of royalties due.

Petition granted; Board decision modified in part.

1. Administrative Practice--Administrative Procedure: Generally--Rules of Practice: Appeals: Extensions of Time--Rules of Practice: Appeals: Reconsideration

An extension of time for filing a petition for reconsideration may be granted in accordance with 43 CFR 4.22(f).

2. Federal Oil and Gas Royalty Management Act of 1982: Generally--Federal Oil and Gas Royalty Management Act of 1982: Royalties--Indians: Leases and Permits: Assignments--Indians: Mineral Resources: Oil and Gas: Allotted Lands--Oil and Gas Leases: Assignments and Transfers--Oil and Gas Leases: Royalties: Payments--Rules of Practice: Evidence

In the absence of a regulation and a Payor Information Form explicitly stating that filing the form constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary.

3. Federal Oil and Gas Royalty Management Act of 1982: Generally--Federal Oil and Gas Royalty Management Act of 1982: Royalties--Indians: Leases and Permits: Assignments--Indians: Mineral Resources: Oil and Gas: Allotted Lands--Oil and Gas Leases: Assignments and Transfers--Oil and Gas Leases: Royalties: Payments--Rules of Practice: Evidence

A division order may constitute evidence that the obligation to pay royalty has been assigned.

4. Administrative Procedure: Administrative Record--Administrative Procedure: Administrative Review--Appeals: Generally--Rules of Practice: Appeals: Generally

An administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for decision.

APPEARANCES: Peter Schaumberg, Esq., Howard W. Chalker, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service; Jerry E. Rothrock, Esq., and Michael S. Ray, Esq., Washington, D.C., for Mesa Operating Limited Partnership.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Minerals Management Service (MMS) has filed a petition for reconsideration of our decision in Mesa Operating Limited Partnership.

125 IBLA 28, 99 I.D. 274 (1992) (Mesa).

MMS initially requested an extension of time to file its petition.

MMS' request stated:

This decision upset a longstanding practice of requiring a payor, who pays royalties due on a lease on behalf of other

payors, to pay underpaid royalties found to be due for those payors' interests, when the payor has identified itself to the MMS (on the Payor Information Form) as the payor for those interests. Counsel for MMS has been required to contact various MMS offices in an effort to determine the impact of this decision on MMS's royalty collections, to determine what MMS's response to the * * * decision will be, and to locate additional documents to support a Petition for Reconsideration.

(Request for Extension of Time to File a Petition for Reconsideration at 1).

[1] The regulation governing reconsideration, 43 CFR 4.403, provides that a petition for reconsideration "shall be filed within 60 days after

the date of the decision. The petition shall, at the time of filing, state with particularity the error claimed and include all arguments and supporting documents." Because of this language, we are as a matter of practice reluctant to grant an extension of time for filing a petition for reconsideration. We are authorized to do so under 43 CFR 4.22(f), however, and did so in this case. 1/ Because we were not persuaded that the 30-day extension MMS requested was warranted, we granted an extension of only 2 weeks.

In our decision we held that the filing of a Payor Information Form (PIF) by a person who holds no interest in a lease does not evidence the designation of the person filing it as responsible for paying the royalty and as a "lessee" within the meaning of 30 U.S.C. § 1702(7) (1988) and 30 CFR 206.101.

1/ 43 CFR 4.22(f)(1) provides: "The time for filing or serving any document may be extended by the Appeals Board * * * before whom the proceeding is pending, except for the time for filing a notice of appeal and except where such extension is contrary to law or regulation." 43 CFR 4.403 does not provide that an extension may not be granted for filing a petition for reconsideration. Cf. 43 CFR 4.411(c); 43 CFR 4.1162, 4.1302(a).

There must be a document assigning the obligation to make royalty payments, or a contract or agreement stating this obligation as there was in Forest Oil Corp., [113 IBLA 30, 39 n.8, 41, 97 I.D. 11, 17 n.8, 18 (1990)]. MMS may specify the "time and manner" for a lessee to notify it of such an assignment or agreement. 30 U.S.C. § 1712(a)(2) [(1988)].

125 IBLA at 43, 99 I.D. at 282. We also held that filing PIF's and making royalty payments did not indicate that Mesa or its predecessor intended to be bound as agents by the lessees' obligation to pay royalties. 125 IBLA at 47-48, 99 I.D. at 284.

MMS argues that, when it adopted regulations implementing the Federal Oil and Gas Royalty Management Act (FOGRMA) in September 1984, it implemented the provisions of 30 U.S.C. § 1712(a) (1988) that a lessee (1) must make royalty payments in the time and manner prescribed by the Secretary and (2) must notify the Secretary of any assignment of a payment obligation under a lease in the time and manner the Secretary prescribes:

Clearly, the PIF requirement in [30 CFR] § 210.51, as explained in the preamble, and its connection with the notification of assignment of paying responsibility in § 218.52, establishes the PIF as the means for implementing the FOGRMA section 102(a) [§ 1712(a)] requirement that the Secretary be notified "of any assignment the lessee may have made of the obligation to make any royalty or other payment under a lease * * *." Therefore, the Board's holding in Mesa that the PIF does not constitute notice of an assignment is contrary to the regulations and published procedures. [2]

(Request for Reconsideration at 4-5).

2/ MMS refers to two responses in the preamble to comments on the proposed rules. The first responds to a general comment objecting "to the burden that the rules will place on small nonoperating lessees and royalty payors, particularly the reporting and paying requirements." MMS' response states:

"Lessees and royalty payors may elect to have the operator or purchaser submit the required payments and reports to MMS. However, as required by

After describing the PIF, we stated in our decision: "With these contents, the PIF cannot constitute an assignment of the obligation to pay royalty, nor is it either evidence of or notice of an assignment." 125 IBLA at 41, 99 I.D. at 281. MMS disagrees, arguing that the lease terms state the lessee's duty to pay royalties, and that, if a person other than the lessee pays royalties, it must be doing so pursuant to an agreement between the parties.

It is simply illogical to assume that a purchaser would fulfill a lessee of record's royalty obligation, or that the lessee would file nothing and pay nothing at the same time, absent some agreement from the purchaser to do so -- i.e., an assignment.

* * * Neither FOGRMA nor the regulations require that such an assignment be in writing. An oral agreement between the

fn. 2 (continued)

the Act, those assuming paying and reporting obligations must comply with MMS reporting and paying requirements. Further, the lessee will remain ultimately responsible for all payments and reports from the lease.

49 FR 37336, 37337-38 (Sept. 21, 1984)."

The second response noted that five people had commented that the 60-day period under proposed section 218.52 for the lessee to notify MMS of its assignment of paying responsibility or of any change in paying responsibility (if anyone other than the lessee is to be responsible for paying) conflicted with the 30-day period in proposed section 210.51 for filing a PIF "no later than 30 days after issuance of a new lease or a change to an existing lease which changes the paying responsibility of the lease." 48 FR 42904 (Sept. 20, 1983). MMS responded that section 218.52 "has been amended to 30 days to conform to § 210.51 requirements. For an explanation of the 30-day requirement, see the discussion of comments on § 210.51 given above." 49 FR 37336, 37340 (Sept. 21, 1984). The discussion of comments on section 210.51 that MMS referred to states in part:

"The MMS's new computerized Auditing and Financial Systems (AFS) cannot properly track payment responsibilities without current and accurate Form MMS-4025 [PIF] data. Consequently, the MMS must receive these forms within 30 days as required at § 210.51. The MMS understands that all the data required on Form MMS-4025 cannot always be provided within 30 days, especially in the case of newly issued leases. Nevertheless, the MMS will require the submittal of that form with the best data available at the time of submittal (at a minimum, MMS must be told who is to be the interim designated payor). An amended resubmittal should be made at a later date when lessee/payor responsibilities are changed." 49 FR 37336, 37338 (Sept. 21, 1984).

parties may be just as binding. Mesa could not assume the lessees' royalty payment responsibility unless the lessees assigned that responsibility to Mesa. Therefore, pursuant to [30 U.S.C. § 1702(7), which defines lessee as including a person who has been assigned responsibility to make royalty payment], Mesa was a lessee and responsible for complying with MMS's order to pay the additional royalties.

(Request for Reconsideration at 5.)

Finally, MMS said it

made a further search of its files and found [two] division orders signed by the leasehold owner directing Pioneer Gas Products Company (Mesa's predecessor), pursuant to the gas sales contract, "to disburse the payments due under said Gas Contract to the payees shown below * * *." The designated payees include the royalty interests, including specifically the United States as trustee for the various Indian allottee lessors.

(Request for Reconsideration at 6). MMS also submitted a third division order dated August 22, 1986, directing Mesa to make payment for gas produced from a well on one of the leases. These division orders establish that Mesa was assigned the royalty payment responsibility by the lessee, MMS argues.

Mesa responds that MMS' petition for reconsideration should be denied because MMS has presented no extraordinary circumstances that warrant reconsideration: "The MMS, in requesting reconsideration, does little more than reiterate the same arguments that were rejected by this Board the first time around" (Opposition of Mesa Operating Limited Partnership to Request for Reconsideration of the Minerals Management Service at 3). Alternatively, Mesa argues MMS may not rely on the division orders it submitted with its petition because it does not explain why they were not produced in response

to the Board's August 29, 1991, order that MMS file the lease files for the leases involved. In any event, Mesa argues, the division orders do not constitute an assignment of the obligation to pay royalties:

A division order is, in essence, a "hold harmless" agreement whereby the operator or royalty owners of a lease agree to "hold harmless" the purchaser of the oil or gas for payments made by the purchaser in the proportions set out in the division order. 8 Williams and Meyers, Oil and Gas Law at 334-35 (1992). These division orders are not filed with, or approved by, the Secretary as required by FOGDMA for notices of assignment, nor are they intended by the parties to be an assignment of the lessees' royalty obligation. ^{3/} Indeed, they are not even signed by Pioneer.

^{3/} In any event, the division orders submitted by MMS are dated in 1982, several months before the January 12, 1983 effective date of FOGDMA. Therefore, the division orders could not possibly have been meant as assignments of royalty obligation pursuant to the requirements of that statute.

(Opposition of Mesa Operating Limited Partnership to Request for Reconsideration of the Minerals Management Service at 6).

We remain unpersuaded that 30 CFR 210.51 and 218.52 establish the PIF as notice of an assignment of the obligation to pay royalty. As proposed in 1983, 30 CFR 218.52 provided that "[t]he lessee shall notify MMS within 60 days of its assignment of paying responsibility or of any change in payment responsibility if any individual or company, other than the lessee, is to be responsible for paying the rentals or royalties * * *." 48 FR 42905 (Sept. 20, 1983). As adopted, section 218.52(a) provides: "When the lessee

or revenue payor assigns any paying responsibility to any other entity, MMS must be notified within 30 days of the assignment." 30 CFR 210.51 provides:

The completed [PIF] must be filed by the party who is making the rent or royalty payment (payor) for each royalty source. [The PIF] must be filed no later than 30 days after issuance of a new lease or a modification to an existing lease which changes the paying responsibility on the lease.

It did so in substance when it was proposed. 48 FR 42904 (Sept. 20, 1983).

Although the changes in section 218.52 conformed the 60-day period to the 30-day period in section 210.51, and this was explained in the second response in the preamble to the final regulations, supra note 2, those changes also required a "revenue payor" as well as "a lessee" to give notice of an assignment and expanded the scope of assignments for which notice is required from rentals and royalties to "any paying responsibility." The combined effect of these changes in section 218.52 was to make the PIF serve so many purposes that its function as the means for a lessee to give notice of any assignment the lessee may have made of the obligation to make any royalty or other payment under a lease in accordance with 30 U.S.C. § 1712(a) (1988) was no longer clear, especially in view of the fact that such an assignment would not likely entail either issuance of a new lease or a modification to an existing lease, the only events that call for filing a PIF under section 210.51. MMS acknowledged this in its October 1990 statement that it planned to revise 30 CFR Part 218:

Responsibilities of Minerals Management Service include the collection of royalties, bonuses, rentals, and related revenues from Federal and Indian mineral leases. These monies are, for the most part, collected from the current designated payor on

the lease. However, if MMS is unable to collect from the current payor, it must pursue collections from a prior payor(s), the lessee, or an assignee of the lease. Existing regulations are unclear as to the responsibilities and liabilities of the parties involved. Therefore, MMS is proposing to amend its regulations to clarify payor, lessee, and assignee requirements and responsibilities.

55 FR 44622 (Oct. 29, 1990).

The first response in the preamble to the 1984 regulations that MMS refers to in its Request for Reconsideration, supra note 2, points out it is permissible for a lessee or royalty payor to shift the burden of paying and reporting to MMS to a purchaser or operator, so long as the purchaser or payor complies with the paying and reporting regulations and the lessee remains ultimately responsible. This response helps explain why the "responsibilities and liabilities of parties involved" are unclear under the existing regulations. It does not make clear that a purchaser such as Mesa becomes liable under these regulations for a lessee's royalties if it files a PIF for the lease. Indeed, the statement in this response that the lessee will remain ultimately responsible implies the contrary.

[2] Our concern remains that neither the language of the regulations nor the PIF itself makes clear that a person who has no interest in the lease but makes royalty payments has been assigned or has agreed to assume the lessee's legal obligation to pay. We are unwilling to hold a person who has no interest in the lease responsible for such an important obligation on the basis of an oral agreement and the filing of a PIF, as MMS suggests. In the absence of a regulation and a PIF explicitly stating that filing a PIF

constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary. Phillips Petroleum Co., 121 IBLA 278, 284-85 (1991); Forest Oil Co., 113 IBLA 30, 39, 97 I.D. 11, 17 (1990), rev'd in part on other grounds, 9 OHA 68, 98 I.D. 248 (1991). For that reason, we twice asked the parties to this appeal whether there were any documents in the record indicating that responsibility for paying the royalties had been assigned to or assumed by Pioneer or Mesa. 125 IBLA at 45-46, 99 I.D. at 283.

[3] We agree with Mesa that MMS submitted the division orders belatedly. We do not agree that the division orders do not indicate that the responsibility for making royalty payments was assigned to Pioneer and Mesa. A division order is "a direction and an authorization to a person who has (or will have) a fund for distribution [of proceeds of oil and gas leases] among persons entitled thereto as to the manner of distribution. A transfer order is a direction and authorization to change the distribution provided for in a division order." 4 Williams Oil and Gas Law § 701 (1992). As Mesa says, a division order is a means for the person responsible for distribution to protect himself against liability in the event of an improper distribution. Id. Usually division orders are prepared by the purchaser or other person responsible for distribution. Id.

MMS submitted three division orders, of which two are entitled "Directions to Pioneer Gas Products Company for Disbursement of Payments under Gas Contract." One of these applies to gas production from four wells producing

from the Chester Formation, two of which are located on lands in which two of the three leases in this case are located, effective on first production. The second applies to gas production from a fifth well located on lands in which the third of the leases is located, effective October 15, 1982. The division orders are signed by the leasehold owners and state: "[P]ursuant

to the provisions of the above mentioned Gas Contract, Pioneer Gas Products Company is hereby directed, until further notice, to disburse the payments due under said Gas Contract to the payees shown below in accordance with

the designated fractional interest of each payee." The first division order specifies the division of interest for (1) royalty interest and excess royalty interest payees, including the United States of America in trust for several people; (2) overriding royalty interest payees; and (3) working interest payees. The second division order specifies the division of interest for two payees, a 0.833333 WI (working interest) and a 0.166667 RI (royalty interest) to the "United States of America in Trust for Willard Betrand Guy and Willdena Frances Buy Beck[,] Minerals Management Service." The third division order submitted by MMS is directed to Mesa and applies to

gas deliveries beginning July 3, 1986, from a sixth well located on the same lands as the fifth well is located. It names the same payee for the royalty interest as the second division order. These documents make clear that Pioneer and Mesa are to pay the royalty and we accept them as evidence that they were assigned responsibility for paying the royalty even though they did not sign them.

[4] The decision Mesa has appealed from required Mesa to pay the amount of Pioneer's January and April 1986 underpayments and to recalculate

the royalties for all other months from March 1981 to November 1988 and report any additional royalty due. However, we cannot be sure these division orders apply to the leases involved in this case, and we do not have division orders or other documents indicating that Pioneer and Mesa assumed responsibility for payment of royalties for all production from these three leases for this time period. The first division order was executed May 30, 1984, and refers to first production from four wells in the Chester Formation. We do not know when first production from these wells occurred, whether these wells are actually on the leases involved in this case, or whether there are other producing wells on these leases. The second division order refers to a single well and indicates this well is on Federal Lease #14-20-206-32354 in the SE¼ of sec. 3, T. 9 N., R. 11 W., rather than Indian lease No. 607-032354, so we cannot be sure it applies to the third lease in this case. See 125 IBLA at 30 n.1, 99 I.D. at 275 n.1.

As a general rule, an administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for decision. Shell Offshore, Inc., 113 IBLA 226, 233, 97 I.D. 73, 77-78 (1990). See also Kanawha & Hocking Coal & Coke Co., 112 IBLA 365, 368 (1990); Wayne D. Klump, 104 IBLA 164, 166 (1988); Soderberg Rawhide Ranch Co., 63 IBLA 260, 261-62 (1982). We therefore set aside the September 20, 1990, decision of the Deputy to the Assistant Secretary--Indian Affairs

(Operations) and remand the case for readjudication based on any documentation that is not available to us.

3/

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, MMS' petition for reconsideration is granted, our decision in Mesa Operating

3/ We noted in our decision in Mesa, 125 IBLA at 42-43 n.16, 99 I.D. at 281-82 n.16, that MMS moved for reconsideration of our decision in Phillips Petroleum Co., *supra*, setting aside the portion of MMS' decision requiring Phillips to recalculate royalties for its co-lessees because there were no PIF's or other indication in the record that Phillips was assigned or had assumed legal responsibility for its co-lessees' royalties. See 121 IBLA at 284-85. With its motion for reconsideration MMS filed copies of the PIF's that Phillips had submitted. After our decision in Mesa, MMS requested that we suspend consideration of its motion for reconsideration of Phillips so that it could locate documents that would indicate an assignment, and we did so. Later MMS submitted a copy of its Request for Reconsideration in Mesa and copies of division orders to Phillips for the leases involved. MMS observed:

"[T]he division orders expressly assign Phillips the responsibility to make royalty payments. The first page of each division order * * * states that 'Phillips shall give credit for said oil as per directions below.' Following this statement is a list of who gets credit and the division of interest. Included in each list is the royalty interest. Thus, the division order indicates that Phillips was assigned and accepted the royalty payment responsibility." (Supplemental Brief at 2).

In Phillips, too, where Phillips filed PIF's on behalf of its co-lessees, we hold the view that in the absence of a regulation and a PIF explicitly stating that filing a PIF constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary. In Phillips, the division orders, on Phillips letterhead, credit the royalty interest to the Bureau of Indian Affairs for the credit of various Indian allotments effective with the first production or first run of the leases and were approved by the Area Oil and Gas Supervisor, Geological Survey, in 1975 and 1976. Because we agree these division orders assign responsibility for payment of royalties to Phillips, by order issued today we vacated the portion of our decision holding it was not apparent from the record that Phillips was assigned or had assumed legal responsibility for payment of its co-lessees' royalties. Because we did not know from the record before us whether all of these division orders remained in effect for all of the January 1979 - June 1987 period MMS required Phillips to recalculate royalties on those leases, however, we remanded the case for readjudication by MMS based on its determination of those facts.

Limited Partnership, 125 IBLA 28, 99 I.D. 274 (1992), is modified in part

so that the September 20, 1990, decision of the Deputy to the Assistant Secretary--Indian Affairs (Operations) is set aside, rather than reversed, and remanded for action consistent with this opinion.

Will A. Irwin
Administrative Judge

I concur:

David L. Hughes
Administrative Judge